



STATE BOARD OF EQUALIZATION

September 20, 2000

Re: Request for Legal Opinion
Account No. SR GO -----

Dear Ms. Curry:

This is in response to your letter dated July 10, 2000, requesting a legal opinion as to the applicable sales taxes on certain balloon products. Your letter states as follows:

"This letter is to request a letter of confirmation that a Board of Equalization Appeals Review opinion given to -----, a sole proprietorship business, in November 8, 1994, regarding applicable sales taxes on certain balloon products will still be applicable if the business is incorporated (and obtains a new sales tax reporting number) so long as it conducts the same business and sells the same products. The business is still owned by ---- and still operates in the same manner as in 1994. The 1994 Board of Equalization Appeals Opinion was given by -----."

Discussion:

The 1994 Decision and Recommendation ("D&R") written by Staff Attorney Rachel Aragon regarding your business, -----s, recited four issues in contention --- whether:

1. Balloonart is a nontaxable service.
2. Expenses incurred due to numerous errors by the Sales and Use Tax Department (Department) should be reimbursed by the Department.
3. Interest on the refund should be calculated at the same rate as the Board charges on late payments.
4. Erroneous oral advice was given by the Board which petitioner relied upon.

I presume that you are asking us to confirm that the decision set forth in the D&R with respect to the first issue states the law as it currently applies to your business, and also to confirm that the results would be the same if you decide to form a corporation to operate the same business.¹

The D&R states that you make "retail sales of balloon bouquets with related entertainment; designing, decorating and displaying of balloonart; balloon drops; and exploding balloon displays." The Department's position with respect to your operations was stated as follows:

"The remaining tax liability is for labor deductions claimed by petitioner for balloonart. The Department contends that receipts for placement of balloonart at customer designated location[s] reflects a taxable rental of tangible personal property. A substantial portion of the value of the property placed at the customer location is related to the wire racks or frame fabricated by petitioner which are required for shaping the decoration. The property is in the possession of the customer for the duration of the transaction. The Department sees no distinction between placement of balloon art and potted plants at a customer facility for a fee. In each instance, the customer contracts for the property being placed in a facility to create an aura, a sensation, or an appearance for a specific period or for a particular event. The Department contends that the true object of the contracts is for the balloons and that the services provided, design and display, are included as part of the sale of the tangible personal property and as such are taxable."

The D&R states your position as:

"Petitioner stated that she is retained to create, design, and display her balloonart at various functions throughout the state. Petitioner creates a 'visual effect' (as termed by petitioner) based on a specific function. When creating a balloon display, it is often necessary to use conduit or wire to make the frame, for arches, garlands, etc. The wire and conduit can sometimes be reused but is usually discarded. Petitioner stated the 'visual effects' are not possessed or controlled by the customer; the 'visual effects' are usually located at third-party event sites; and the 'visual effects' are installed and removed by petitioner. The balloons are fragile and have a very limited existence. They degrade rapidly and are generally not usable within 18 hours after inflation.

"Petitioner contends the balloons are merely a step in the displaying and executing of an effect for the customer. Petitioner stated that her customer is purchasing a service, an effect and design, not balloons. Petitioner does not charge for each balloon or for the wire or conduit but instead the charge is based on the entire service of designing, setting up, cleaning up and disposing of the balloons and other materials.

"Petitioner also stated that balloonart is nothing like plant rental. Unlike plants, balloon sculptures deteriorate rapidly and cannot be resold. When a customer requests a visual effect, it has to be built from scratch. Petitioner contends that her balloonart is analogous to firework displays and floats and as such is a nontaxable service."

¹ This letter will not address the last three issues in the D&R, as they address matters which were specific to that audit, and do not involve issues which may be relevant to your business on an on-going basis.

Ms. ----- found that under the facts as stated, the charges for "visual effects" or "balloonart" are nontaxable services. The D&R states:

"Relevant to the analysis is Sales and Use Tax Annotation 515.0990 which states:

'A charge for furnishing a fireworks display is not subject to sales tax when the fireworks company retains title to and possession of the fireworks and employees of the company explode the fireworks. In such case, the fireworks company performs a service and is the consumer of the fireworks so furnished. (10/8/81.)'

"Although petitioner in this case is not in the business of producing firework displays, petitioner's business is similar enough for the annotation to apply. We disagree with the Department that petitioner's balloonart is analogous to plant rental.

"In a matter almost identical to that of petitioner, the Board held that balloonart was similar to firework displays and concluded that balloonart was a nontaxable service. We agree with that conclusion. Petitioner maintains that its customer never receives title or possession of the balloons or other materials. Within a matter of hours, the entire display is gone and the customer is not left with anything tangible. Petitioner's customer is not contracting to purchase and retain tangible personal property, rather petitioner's customer is paying for performance of a temporary service, the designing, building, setting up, tearing down, and discarding of a balloon display. Therefore, we conclude petitioner's 'visual effects' (balloonart) is a nontaxable service."

I agree that the D&R sets forth the correct application of law to the facts described therein. In that regard, if your business still operates in the same manner as described in the 199L D&R, your company's charges for the balloonart would still constitute a nontaxable service today. Additionally, if you decide to form a corporation to conduct the business, and obtain a new permit, the sales and use tax law would apply in the same manner to the activities of the corporation as it does to your activities as a sole proprietor. If you have further questions, please write again.

Sincerely,

Jeffrey H. Graybill
Tax Counsel

JHG:lfb

cc: San Jose District Administrator - GH